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16 August 1966

MEMORANDUM FOR THE RECORD

SUBJECT: Payment of Night Differential by the NPIC Photo Laboratory

1. Two resigning employees of NPIC's Photo Laboratory Branch requested interviews with a member of the IG Staff in connection with exit processing in early June 1966. Both had worked the night shift, and both complained that the day shift is favored when the laboratory goes onto two 12-hour shifts to handle heavy film inputs. The normal laboratory hours are from 0800 until 0030. When the laboratory goes onto a 24-hour basis, the day shift works from 0800 until 2000 and the night shift from 2000 until 0800. On the regular 1600 to 0030 night shift, employees receive six hours of night differential pay (for the hours from 1800 until 2400). When they go onto the twelve-hour shift from 2000 until 0800, they receive only four hours of night differential (from 2000 until 2400).

25X1 2. Agency regulation [] specifies that: "Night differential is payable for any regularly scheduled work performed between 1800 hours and 0600 hours when such work is part of an assigned tour of duty." The regulation further specifies that night differential is payable in conjunction with the payment of overtime when the overtime falls within another regularly scheduled tour of duty.

3. If these employees on the twelve-hour shift were being paid for only four hours of night differential (from 2000 until 2400), it would seem that NPIC must consider the hours worked after 2400 as not regularly scheduled. If this is indeed NPIC's position, I believe it should be questioned. Assuming that the employee works at least eight hours on each of five days during the administrative workweek, the first eight hours of each day would be counted as regular time. Thus, the employee who comes on duty at 2000 would be on regular time until 0400 and should receive night differential for at least eight hours. When the night shift goes onto a twelve-hour shift, this becomes its tour of duty--its assigned hours of work. In fact, the employee ceases to report for duty at his regular time (1600 hours) and reports instead at 2000. He is not working a mere extension of his normal shift; he is working an entirely different shift.

25X1 4. Presumably the employee on the twelve-hour shift would be on overtime from 0400 until 0800. Since that overtime does not fall "within another regularly scheduled tour of duty," Agency regulation [] would deny the employee night differential during the overtime hours. I believe that [] is itself subject to question in this respect. Although I am not a qualified legal researcher, such digging as I have done has failed to turn up any statutory or regulatory

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foundation for the provision of [] which specifies that night differential is payable in conjunction with the payment of overtime only when the overtime falls within another regularly scheduled tour of duty. The Agency may have arbitrarily decided to depart from statutory authorizations in this regard, but, if so, I think the decision of doubtful legality.

5. The Federal Employees Pay Act of 1945 (59 Stat. 298) provides that night differential may be paid but is silent on whether the differential may also be applied to overtime hours. With regard to overtime, the statute says merely that:

" . . . differential for night duty shall not be included in computing any overtime compensation to which the officer or employee may be entitled . . . "

6. The Federal Employees Pay Act of 1946 (60 Stat. 218) amends the Act of 1945 and is specific on the point of payment of night differential during overtime hours:

"Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of . . . "

7. The present law on night differential is codified as 5 U.S.C. 921 and is based on the 1954 amendment to the Acts of 1945 and 1946. It makes no distinction between regular time and overtime:

"Any regularly scheduled work between the hours of six o'clock postmeridian and six o'clock antemeridian . . . shall be considered nightwork, and any officer or employee performing such work . . . shall be compensated for such work at his rate of basic compensation plus premium compensation amounting to 10 per centum of such rate . . . "

8. The Comptroller General issued a decision on 19 March 1957, 26 Comp. Gen. 657 (B-129965), giving his interpretation of the law:

"Regularly scheduled work which falls between 6:00 p.m. and 6:00 a.m. for payment of night differential is work which is scheduled in advance by proper administrative authority and continues for a minimum of two consecutive weeks; and although night work does not have to be scheduled for each day of the workweek, it must be scheduled on at least one day of each of the two or more workweeks."

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9. In October 1960 the United States Court of Claims ruled in favor of the plaintiffs in a suit brought against the Department of Agriculture for payment of night differential (Juan Aviles, et al. v. United States, Ct. Cl. No. 278-56). The effect of the court's decision was to upset the earlier Comptroller General ruling. These are pertinent extracts from the court's decision:

"Plaintiffs claim for additional pay is based on section 301 of the Federal Employees Pay Act of 1945 for the period prior to September 1954 and on the 1954 amendment to the Act, 68 Stat. 1110, for the time subsequent thereto. The parties have agreed that the 1954 amendment did not work any substantial change in the meaning and effect of the statute . . .

". . . the regularly scheduled tour of duty went beyond the 'basic workweek' and the 'regularly scheduled workweek' described in the statutes and regulations because it was understood and anticipated that overtime would be regularly worked. The tours of duty worked by plaintiffs really constituted the regularly scheduled administrative workweeks or tours of duty . . . because the tours actually worked were the 'periods . . . when such employees were required to be on duty regularly.'

"Regularity does not require a similar program for an indefinite time; it is enough if a certain course of events continues for a period of time sufficiently long enough for the individual to say that it is his usual or customary employment.

"Our understanding of section 301 of the Federal Employees Pay Act of 1945 is that if overtime is regularly scheduled any part of that overtime occurring after 6 p.m. must be compensated at the night differential rate."

10. With this as precedent, the Comptroller General on 4 January 1961 in 40 Comp. Gen. 397 (B-144390) decided as follows:

". . . where work is authorized in advance and scheduled to recur on successive days or after specified intervals, the employees may properly be paid night differential for 'regularly scheduled work' in accordance with section 301 of the Federal Employees Pay Act of 1945, 5 U.S.C. 921.

"To constitute 'regularly scheduled work' between the hours of 6 p.m. and 6 a.m. for entitlement to night differential . . . the work must be duly authorized

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in advance and must be scheduled to recur on successive days or after specified intervals; the requirements stated in 36 Comp. Gen. 657 that work must be scheduled over two successive administrative workweeks to constitute 'regularly scheduled work' is modified accordingly."

11. Another Comptroller General decision, of 6 July 1961, 41 Comp. Gen. 8 (B-145581), treats specifically of payment of night differential in connection with overtime:

"Security couriers . . . who are assigned to . . . duties which necessitate night work that recurs regularly . . ., although not according to a fixed hours-of-work pattern, may have the time worked considered as part of the regularly scheduled tours of duty and be paid night differential . . . for any time worked between 6:00 p.m. and 6:00 a.m. in either basic workweek hours or in the overtime hours."

12. The regulations of the Civil Service Commission (FPM 550.1-4) say merely that:

"The act authorizes a night differential of 10 percent of the employee's basic pay in addition to his basic pay, to be paid for any regularly scheduled work between 6 p.m. and 6 a.m."

I find nothing in the Civil Service Commission regulations distinguishing between regular time and overtime in connection with payment of the night differential.

13. I checked the regulations of the Department of State to see how the Department provides for payment of night differential. The text of the regulation (328.22) appears to be consistent with the law and the interpretations that have been made of it.

"Any employee . . . who is regularly scheduled to perform night work with or without advance notice, either as a part of his basic workweek or on an overtime basis, shall be paid night differential for all such work. If an employee performs such work on an overtime basis he is entitled to both overtime and night differential if otherwise eligible."

The regulation then goes on to cite "for examples" illustrating how the regulation is to be applied. The examples appear to place an interpretation on the regulation that differs little from the wording of CIA's regulation on payment of night differential in conjunction with payment for overtime.

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25X1 14. I checked with [] in the Cable Secretariat to see how he handled payment of night differential. The CSDO's cover the weekends by working overtime, thus giving each of them periodic weekends off duty. The Cable Secretariat does pay night differential in conjunction with overtime for these employees. Since work is scheduled in the Cable Secretariat 24 hours per day and the day is customarily made up of three eight-hour shifts, these employees are considered to be working overtime on another shift.

15. I also checked the texts of the various pay acts that have been passed since 1954 to see if any of them modified the earlier provisions concerning night differential, specifically: The Federal Employees Salary Increase Act of 1960 (P.L. 86-568), The Classification Act Amendments of 1962 (P.L. 87-793), and The Federal Employees Salary Act of 1965 (P.L. 89-301). I found no mention of night differential in any of these later statutes.

25X1 16. Since the Agency regulation on night differential seems to be contrary to the law, as interpreted by the courts and by the Comptroller General, I checked with the Office of Personnel to see if there was a precedent that I had missed in my search. I called [] 25X1 [] and asked him to refer me to someone who could shed light on the derivation of the provision of [] that pertains 25X1 to night differential. A short while later I was called by a [] 25X1 [] The young lady who wrote the most recent version of that regulation is on her honeymoon. Neither [] knew offhand how Agency policy was arrived at or upon what it is based. Both assured me that they would look into the matter and would be in touch with me later.

25X1 17. I also spoke with [] in the Office of Finance. He said that he had nothing to do with the writing of the regulation and that his office did not question or adjudicate claims for night differential payment. The Office of Finance accepts the certification of the officer approving the employee's T&A card.

18. It is possible, of course, that the complaining resignees were misinformed and that they were being paid the night differential due them. I should also note that I have not yet inquired into NPIC's night differential policy; hence, my assumptions in this memorandum may later be proved wrong.

25X1 19. I suppose it could be argued that the various statutes cited in this memorandum do not apply to the excepted service and that CIA is legally bound only by those provisions of the statutes that it incorporates into its own regulations. We do not include all of the statutory pay provisions in our regulations. For example, one of the justifications cited in [] for not paying GS-11's and above for the first eight hours of overtime worked is that, "Many professional positions require duty at several places and at irregular times of day and involve duties of such

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Approved For Release 2004/05/25 : CIA-RDP69-00011R000100080016-8

nature that the need for the duration of the duty periods can be determined only by the individual." Essentially those words are used in the statute, not for denying payment of overtime, but for justifying payment of premium compensation in connection with irregular and unscheduled tours of duty. The payment of such premium compensation is an optional provision, and the Agency omits it from its regulation.

20. For the most part, though, our regulations on hours of work, leave, and pay adhere quite closely to the statutory provisions applicable to the classified service. In my opinion, if we elect to incorporate a statutory provision into our regulations, we are then bound by subsequent interpretations by the courts or by the Comptroller General as to the precise meaning or intent of the provision. It seems to me that [] ascribes a meaning to "regularly scheduled" that is not consistent with the interpretation of the courts or of the Comptroller General; hence, our restriction on payment of night differential in conjunction with payment of overtime is invalid.



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